SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 575.

JULES W. ARNDSTEIN, *Appellant*

vs.

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York.

BRIEF FOR THE APPELLANT.

WILLIAM J. FALLON,
GEORGE L. BOYLE,
RUFUS S. DAY,
Counsel for Appellant.

FALLON & McGEE,
Of Counsel.

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BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This is an appeal in habeas corpus from a final decision of the United States District Court for the Southern District of New York refusing to discharge the prisoner. The District Court even refused to issue the writ.

In February, 1920, three indictments were returned against appellant by the Grand Jury, New York County, New York, said indictments being based upon appellant's alleged complicity in certain alleged bond thefts.

And appellant was released upon bail pending trial upon said indictments and has ever since remained on bail insofar as these indictments are concerned.

Subsequent to the findings of said indictments and while appellant was at liberty on bail, as aforesaid, the National Surety Company filed in the United States District Court for the Southern District of New York a petition for involuntary bankruptcy against him, copy of which petition is to be found in the record filed herein (Rec., 4), in which petition the Surety Company alleged that members of the New York Stock Exchange, Investment Houses and Banking Institutions, its bonded customers, had lost large sums of money by reason of theft by appellant.

On the same day that the petition was filed, to wit, the 20th day of February, 1920, a subpoena in bankruptcy was issued returnable February 27, 1920. On the 25th day of February, 1920, said subpoena was served by delivery to Sylvia Rona, a maid employed by Fanny Brice Arnstein, the wife of appellant. On the 4th day of March, 1920, an adjudication of bankruptcy was entered by default and an order of reference in said matter entered referring same to Seaman Miller (Rec, 6). On the 18th day of May, 1920, an order for the examination of appellant under section 21-a of the Bankruptcy Act was served and filed upon him. Thereafter and on various dates appellant was examined under section 21-a and refused to answer certain questions propounded to him by the attorney for the trustee upon the ground that said questions would tend to degrade or incriminate him. On the first day of June, 1920, an order to show cause to punish appellant for contempt was signed by Augustus N. Hand, United States District Judge, and thereafter served on appellant (Rec., 7). On June 10, 1920, pursuant to an order of the United States District Court for the Southern District of New York (Rec., 38), and under

direction of said court, schedules were filed by appellant (Rec., 40). On June 29, 1920, a decision was rendered by Judge Hand holding that appellant should not be punished for contempt and that he was privileged in refusing to answer said questions by virtue of the protection afforded him by the Constitution of the United States (Rec., 56). On June 30, 1920, a motion was heard by Judge Hand as to whether the bankrupt, appellant, should be required to testify about his schedules and whether he should not be required to turn over the proceeds of the securities set forth in the motion papers. On August 10th, 1920, a decision was handed down by Judge Hand, directing appellant to answer certain questions by reason of the fact that he had filed the schedules as ordered and directed by the Court (Rec., 57). On the 7th day of September, 1920, an order was entered in the clerk's office for the Southern District of New York, directing appellant to make answer to certain interrogatories, a copy of the order and interrogatories appearing in the record filed herein (Rec., 58). September 14, 1920, appellant appeared before United States Commissioner Alexander Gilchrist, Jr., in pursuance of the subpoena served upon him under Section 21-a of the Bankruptcy Act. Upon being asked the questions contained in schedule "C" under said order, he refused to answer said questions upon the ground that said questions would tend to degrade and incriminate him. On the 15th day of September, 1920, an order was entered by Circuit Judge Martin T. Manton, sitting as a District Judge for the Southern District of New York, committing appellant to the custody of Thomas D. McCarthy as Marshal for the Southern District of New York for his refusal to answer the questions directed to be answered by the Commissioner upon the hearing had

under Section 21-a of the Bankruptcy Act and by the subsequent order of Judge Hand of August 10, 1920 (Rec., 61). Under said order appellant was taken into custody by the said Marshal and placed in jail, where he has ever since remained.

On September 16, 1920, appellant applied to Judge Manton, sitting as a District Judge for the Southern District of New York, for a writ of habeas corpus. The said writ of habeas corpus was on the 17th day of September, 1920, denied by Judge Manton, an opinion having been handed down by him, a copy of which is printed in the record (Rec., 62).

From this judgment of the United States District Court for the Southern District of New York denying the writ, and refusing to discharge the prisoner, the case is in this Court on appeal (Rec., 65).

SPECIFICATIONS OF ERROR.

I. That the court erred in denying said writ of habeas corpus and remanding the petitioner to custody.

II. That the court erred in holding that the petitioner was not unlawfully restrained to his liberty.

III. That the court erred in not holding that the petitioner was held without due process of law and in violation of his rights under the Federal Constitution.

IV. That the court erred in holding that the order made by the United States District Court for the Southern District of New York on September 16th, 1920, committing petitioner to the custody of the U. S. Marshal for the Southern District of New York for refusing to answer the questions asked him in the bankruptcy proceedings of Jules W. Arndstein, an al-

leged bankrupt, before U. S. Commissioner Gilchrist, was valid.

V. That the court erred in holding that petitioner was guilty of contempt in refusing to answer the questions asked him in said bankruptcy proceedings before U. S. Commissioner Gilchrist, sitting as U. S. Commissioner in said Southern District of New York.

VI. That the court erred in holding that the writ of habeas was not the proper remedy in this case to release petitioner from custody (Rec., 66).

HABEAS CORPUS IS THE PROPER REMEDY.

Loveland in his work on Bankruptcy, Vol. 2, Sec. 685, states: "Where a person has been imprisoned for contempt, relief is usually sought by habeas corpus."

In In re Watts, 190 U. S., 1, the petitioner, who had been imprisoned for contempt for refusal to obey the order of the United States District Court for the District of Indiana in a bankruptcy proceeding in that court, in an appeal in habeas corpus to this court, was by this court ordered discharged; the court concluding its opinion in the following language: "We are of opinion that there was no legal evidence to sustain the convictions for contempt, and the order in each case must be Petitioner discharged."

It is clearly established that this court has jurisdiction to review an appeal in habeas corpus from the judgment of the District Court of the United States ordering the commitment of the bankrupt to jail for contempt in refusing to obey its order in a bankruptcy proceeding. And this is true notwithstanding that the court below in this case held that the appellant "should

have proceeded by a petition to revise and seek to reverse the order in the Circuit Court of Appeals." The District Judge used the following language: "If the relator felt aggrieved by Judge Hand's order, he should have proceeded by a petition to revise and seek to reverse it in the Court of Appeals. He does not do this, but urges here that he may test the question on a writ of habeas corpus, contending that his constitutional rights are invaded if he be required to answer the questions. It is clear that this contention is a fallacy."

That the bankrupt "may test the question on a writ of habeas corpus" is clearly established. That very thing was done in this court in In Re Watts, 190 U. S., *supra*.

When a person is imprisoned by a United States Court for refusing to comply with an order of that court, and such order is beyond the jurisdiction or power of the court to make, the order itself is void, and the order punishing for contempt is likewise void, and this court will, on writ of habeas corpus, discharge the person so imprisoned. Ex parte Lange, 18 Wall. 163; Ex parte Rowland, 104 U. S., 604; Ex parte Fiske, 113 U. S., 713; In re Ayres, 123 U. S., 443; In re Lane, 135 U. S., 443; In re Tyler, 149 U. S., 164; In re Bonner, 151 U. S., 242; In re McKenzie, 180 U. S., 536.

THE APPELLANT WAS AFFORDED FULL LEGAL JUSTIFICATION IN REFUSING TO ANSWER QUESTIONS WHICH HE CONSIDERED MIGHT TEND TO CRIMINATE HIM, BY VIRTUE OF THE PROVISION OF THE FIFTH AMENDMENT OF THE CONSTITUTION WHICH FORBIDS HIM FROM BEING COMPELLED "TO BE A

WITNESS AGAINST HIMSELF," AND THIS IS TRUE REGARDLESS OF SEC. 7, PARAGRAPH 9 OF THE BANKRUPTCY ACT, WHICH PROVIDES THAT "NO TESTIMONY GIVEN BY THE BANKRUPT SHALL BE OFFERED IN EVIDENCE AGAINST HIM IN ANY CRIMINAL PROCEEDINGS."

The leading case on this question is Counselman vs. Hitchcock, 142 U. S., 547, wherein this court held that under the Fifth Amendment to the Constitution of the United States, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," where a person is under examination before a grand jury, in an investigation into certain alleged violations of the interstate commerce act of Feb. 4, 1887, 24 Stat., 379, he is not obliged to answer questions where he states that his answers might tend to criminate him, although section 860 of the Revised Statutes provides that no evidence given by him shall be in any manner used against him, in any court of the United States, in any criminal proceeding.

It further held that the meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself; but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime.

The court held that the manifest purpose of the constitutional provisions both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness and that the liberal construction which must

be placed on constitutional provisions for the protection of personal rights, would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation.

And the court further held that the witness, having been committed to custody for his refusal to answer, was entitled to be discharged on habeas corpus.

Mr. Justice Blatchford in delivering the opinion of the court in the Counselman case said: It remains to consider whether section 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence or in any manner used against him or his property or estate, in any court of the United States, in any proceeding, or for the enforcement of any penalty or forfeiture. It follows, that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which

be might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

"The constitutional provision distinctly declares that a person shall not 'be compelled in any criminal case to be a witness against himself;' and the protection of Section 860 is not coextensive with the constitutional provision. Legislation can not detract from the privilege afforded by the Constitution. It would be quite another thing if the Constitution had provided that no person shall be compelled in any criminal case to be a witness against himself, unless it should be provided by statute that criminating evidence extracted from a witness against his will shall not be used against him. But a mere act of Congress cannot amend the Constitution, even if it should engraft thereon such a proviso."

Chief Justice Marshall in Burr's Trial, 1 Burr's Trial, 244, on the question whether the witness was privileged not to answer [illegible] said: "If the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not."

In Boyd vs. United States, 116 U. S., 616, Mr. Justice Bradley, delivering the opinion of the Court, said: "Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power;

but it cannot abide the pervasive atmosphere of political liberty and personal freedom."

THE APPELLANT ARNSTEIN DID NOT WAIVE HIS CONSTITUTIONAL RIGHT TO REFUSE TO ANSWER ANY QUESTIONS THAT MIGHT TEND TO INCRIMINATE HIM BY REASON OF HIS FILING OF SCHEDULES IN BANKRUPTCY PROCEEDINGS IN ACCORDANCE WITH AN ORDER OF THE COURT.

Judge Manton in his opinion in this case, in which he denied the writ of habeas corpus, held that a bankrupt who has taken part in a bankruptcy proceeding by attempting to file an answer and later to file his schedules, has waived any constitutional privileges which might be involved in answering the questions propounded (Rec., 62). In this ruling, we respectfully contend, the District Judge erred.

At the time the questions were asked appellant, he was not only exposed to the danger of prosecution, he was actually under indictment, and the connection between the information which it was sought to elicit from him in the bankruptcy proceedings, and the evidence to sustain the prosecution was direct and immediate.

Appellant, in his petition for a writ in habeas corpus, states: " * * * three indictments were found against said Jules W. Arnstein by the Grand Jury of New York County. * * * That your petitioner is informed and believes that the bonds mentioned in said indictments are the same bonds on account of which the National Surety Company, the petitioning creditor in the bankruptcy proceedings, claims to be a creditor

of the said Jules W. Arnstein. That your petitioner is also informed and believes that certain proceedings have been taken before the United States Grand Jury for the District of Columbia, and said Jules W. Arnstein is about to be indicted by the Federal Grand Jury as your petitioner is informed and believes, being the basis on account of which the National Surety Company, the petitioning creditor in the bankruptcy proceedings, claims to be a creditor of said Jules W. Arnstein" (Rec., 3).

In Ensign vs. Pennsylvania, 227 U. S., 592, Mr. Justice Pitney, in delivering the opinion of the court, distinctly distinguishes between the matter of filing schedules and that of giving testimony under the bankruptcy Act, insofar as the privilege of the act is concerned, which provides that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding. Mr. Justice Pitney said: "The refusal of the plaintiffs in error, of course, is upon that part of clause 9 of the section which declares—'but no testimony given by him shall be offered in evidence against him in any criminal proceeding.' It is insisted that, in accordance with the spirit of the 5th Amendment, this should be construed as applying to the schedule required to be prepared, sworn to, and filed by the bankrupt under the provisions of the 8th clause. But as a matter of mere interpretation, we deem it clear that it is only the testimony given upon the examination of the bankrupt under clause 9 that is prohibited from being offered in evidence against him in a criminal proceeding. The schedule referred to in the 8th clause, and the oath of the bankrupt verifying it, are to be 'filed in court,' and, therefore, are, of course, to be in writing. The word 'testimony' more properly refers to oral evi-

dence. It was reasonable for Congress to make a distinction between the schedule, which may presumably be prepared at leisure and scrutinized by the bankrupt with care before he verifies it, and the testimony that he is to give when he submits to an examination at a meeting of creditors or at other times pursuant to the order of the court,—a proceeding more or less unfriendly and inquisitorial, as well as summary, and in which it may be presumed that even an honest bankrupt might, through confusion or want of caution, be betrayed into making admissions that he would not deliberately make. Full effect can be given to the clause, 'but no testimony given by him shall be offered in evidence against him in any criminal proceeding,' by confining it to the testimony given under clause 9, to which the words in question are immediately subjoined. And we think that proper interpretation requires their effect to be thus limited."

It would thus clearly appear that the mere fact that the bankrupt filed schedules, in this case, would not bar him from claiming his privilege not to testify against himself. Even the Bankruptcy Act clearly distinguishes between filing schedules and the giving of testimony by the bankrupt.

This question was definitely ruled upon in In Re Podolin, 205 Fed. 563, 567, wherein Circuit Judge McPherson, in the United States District Court for the Eastern District of Pennsylvania, said: "The referee's order of May 12, 1913, will be so modified, *ex majari cautela*, as to provide expressly that the bankrupts may omit from their schedules any reference to the transactions with Rudsky. They are still exposed to the danger of prosecution in connection with that transaction, and they should not be compelled to run

the most remote risk of having their statements used against them in such a prosecution. The connection between such statements and the evidence to sustain the prosecution is direct and immediate."

What was the character of the information which it was sought to compel appellant to disgorge upon cross-examination in the bankruptcy proceedings? Was it of such a character as to impel the court to inform the bankrupt that he was privileged in refusing to answer questions which would elicit such information from him?

Viewed in the most unfavorable light to appellant, if the District Court from the nature of the questions propounded the bankrupt could reasonably have been led to the conclusion that the questions asked were for the purpose to involve the bankrupt in the transaction concerning stolen bonds, for which he had already been indicted, the mere fact that he had filed his schedules, as ordered by the court, would not preclude him from availing himself of his privilege to refuse to answer the questions for the reason that to do so might tend to incriminate him. Podolin vs. Lescher Warner Dry Goods Co., 210 Fed. 97, opinion by Judge Gray, wherein he said: "Where the bankrupt claims his constitutional privilege under the Amendment and refuses to give the information required by the Bankruptcy Act, on the ground that it may incriminate him, it must at least appear to the court, from the character of the information sought or the questions propounded, that his claim is justified, or the bankrupt must produce facts on which he bases such claim in order that the court may judge of their sufficiency to support."

It is only necessary to refer to the record in this case to conclusively show that the questions propounded in this proceeding were such that, from the character of the information sought and the questions propounded, the appellant's claim was justified.

The court below ordered the bankrupt to answer such questions as the following:

"Did you, at any time during the past six months, hear any conversation between Gluck and Nick Cohen?" (Rec., 19, Q. 9.)

Cohen had been indicted with Arndstein for the theft of the bonds, against which the National Surety Company, the petitioner in bankruptcy, had insured the owners of the securities.

"Did you touch any stocks or bonds any time or place within the past year?" (Rec., 21, Q. 52.)

"Did you ever come to Washington with Nick Cohen?" (Rec., 21, Q. 58.)

"Have you made any statement to anyone about your affairs to anyone in the past six months?" (Rec., 22, Q. 80.)

"By what other names have you been known besides Jules Arndstein?" (Rec., 23, Q. 2.)

"Do you remember receiving some money from Nick Cohen in Washington, D. C., on or about October 13th, last?" (Rec., 24, Q. 31.)

"Did you ever receive any property of any nature, kind, or description from Joseph Gluck?" (Rec., 26, Q. 74.)

"Were you in any gambling houses in the United States within the past three months?" (Rec., 33, Q. 273.)

"Did you ever see any stocks or bonds during the past year anywhere?" (Rec., 21, Q. 51.)

"Did you ever meet Nick Cohen in Washington?" (Rec., 21, Q. 59.)

"Will you state your movements since you arrived in New York City this morning?" (Rec., 21, Q. 66.)

"How often have you seen Nick Cohen since the 10th of February this year?" (Rec., 22, Q. 74.)

"Did you ever receive any property of any kind from Nick Cohen?" (Rec., 23, Q. 10.)

"Did you ever register in any hotel outside of New York under any other name than Arnold?" (Rec., 29, Q. 166.)

"Do you know under what different names Nick Cohen has been known?" (Rec., 30, Q. 198.)

"Were you not in possession of a satchel containing a large amount of securities, at the Pennsylvania Railroad Station, and on a train between New York and Washington, when in possession of that claimed satchel containing such securities in October, 1919?" (Rec., 33, Q. 1.)

By ordering the appellant to answer such questions as these and to deny his petition for a writ of habeas corpus, based upon the contention that his constitutional privilege protected him from answering such questions, the court below may as well have said to the defendant: "You must answer these questions concerning your negotiations with alleged confederates under indictments now pending against you and them jointly for the theft of those bonds. Why? Because you have filed a schedule." The questions themselves are sufficient answer that the character of the information sought and the questions propounded in the bankruptcy proceeding were such that appellant was within his rights in claiming his privilege under the protection afforded him by the constitutional amendment. The ruling of the District Court is so clearly erroneous and arbitrary that a further discussion is not necessary.

CONCLUSION.

Appellant was committed to jail as punishment for an alleged civil contempt by virtue of an order of the United States District Court for the Southern District of New York for refusing to answer certain questions propounded to him by the attorney for the trustee on cross-examination in an involuntary bankruptcy proceeding in that court.

His refusal to answer the questions was based upon the ground that to do so might tend to incriminate him, and at the time of his refusal three indictments were pending against him in the State of New York.

He applied for a writ of habeas corpus before the United States District Court for the Southern District of New York on the ground that the order of the District Court, committing him to jail, was unconstitutional, in that it deprived him of his liberty without due process of law in violation of the Federal Constitution; that the order, being unconstitutional, was, therefore void, and being so, the Court was without jurisdiction to issue it. The judge of the District Court denied the writ, and allowed an appeal upon which the cause is now before this Honorable Court.

Appellant has been denied bail, and still remains incarcerated in the New York jail in the custody of the United States Marshal for the Southern District of New York.

Under these circumstances appellant respectfully urges that this court should order his discharge from his unlawful imprisonment.

Respectfully submitted,

WILLIAM J. FALLON,
GEORGE L. BOYLE,
RUFUS S. DAY.

FALLON & MCGEE,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JULES W. ARNDSTEIN, APPELLANT,
v.
THOMAS D. MCCARTHY, UNITED STATES marshal for the southern district of New York. } No. 575.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE.

This is an appeal from the judgment of the District Court declining to issue a writ of habeas corpus.

THE FACTS.

Since the petition was denied, the correctness of the judgment must be determined from the facts as alleged in the petition for habeas corpus and the exhibits thereto. From these, it appears that on February 20, 1920, the National Surety Company filed a petition for involuntary bankruptcy against the petitioner, claiming to be a creditor in an amount exceeding $500. The nature of the claim was stated substantially as follows:

The National Surety Company had issued to a number of customers, who were members of the New

York Stock Exchange, policies of insurance intended to insure such persons against loss by theft; that large sums had recently been lost by said persons by theft by petitioner; that the surety company had made good these amounts and taken an assignment of the right of action occasioned by the theft of the property (Rec., pp. 4–5); that on March 4, 1920, an adjudication of bankruptcy was entered by default; that on the 18th of May, 1920, an order for the examiner of petitioner under section 21 (a) of the Bankruptcy Act was served and thereafter, on various dates, he was examined and refused to answer certain questions upon the ground that to do so would tend to degrade or incriminate him; that thereafter a hearing was had before Judge Hand on an order to show cause why he should not be punished for contempt; that not having then filed any schedules, Judge Hand ruled that he could not be compelled to answer the questions and declined to punish for contempt, but ordered him to file schedules; that later he did file schedules in which the only property scheduled was a deposit of $18,000 in a bank; that thereafter Judge Hand ruled that, having filed these schedules, he was subject to examination with respect thereto and ordered him to answer certain of the questions which had previously been propounded; that upon his refusal to answer these questions he was committed for contempt. To be relieved of this imprisonment, he sought a writ of habeas corpus. The writ was denied upon the ground that having failed to claim the privilege of declining to file sched-

ules upon the ground that the disclosures made by them and the examination to which they subject him would tend to incriminate him he could not refuse to answer proper questions propounded for the purpose of testing the truth of the schedules as filed.

It appears that another witness, in the course of his examination in the bankruptcy court, had testified with respect to a large number of securities having been delivered to the petitioner within a short time before the bankruptcy proceedings. The inference is that these were securities which had been stolen and for which the surety company had been compelled to make compensation under its policy of insurance. From the portions of the testimony appearing in this record it does not distinctly appear whether this inference is correct. It does appear, however, from the testimony of the witness that within a short time before the bankruptcy proceedings the petitioner was in possession of these securities and disposed of them, or some of them, and received the proceeds. (Rec., pp. 8–19.) The inquiry with respect to these securities and their proceeds was therefore proper in connection with the schedules as filed. The questions propounded in the main related with more or less directness to these matters. The question therefore is whether a bankrupt who files schedules in the usual form may be compelled to answer questions testing the truth of these schedules.

> section 2276), so long as it opens the way to no independent fact (*Evans* v. *O'Connor*, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316; *Low* v. *Mitchell*, 18 Me. 372). Such, at least, is the American rule. It is as if the bankrupt had sworn on the examination itself: "I have no property except Whiteacre." He could not stop the inquiry with that answer, but would be open to further search designed to test the truth.

This states a simple rule of justice. The petitioner, knowing what it would lead to, might have refused to file a schedule of his property. When he did, however, file such a schedule, and swear that the only assets that he had consisted of a certain amount of money in bank, to permit him to refuse to answer questions intended to test the truth of this statement, would be not merely to permit him to withhold facts which might incriminate him, but to actually pervert the truth with respect to facts about which he has voluntarily testified. Even if all the questions, therefore, could be said to have been such as that the answers might tend to incriminate him, he had clearly waived his privilege and could properly be compelled to answer.

In the second place, a witness is not the sole judge of whether his evidence will bring him into danger of the law—it must appear that there is reasonable ground of such danger. *Brown* v. *Walker*, 161 U. S. 591, 599. The opinion of Judge Hand in *In re Tobias, et al.*, 215 Fed. 815, 816, clearly states the law on this subject. He says:

> Moreover, the mere claim of privilege is not enough. *Podolin* v. *Lesher Warner D. G. Co.* (C. C. A. 3d Cir.), 31 Am. Bankr. Rep. 796, 210 Fed. 97. There must be some basis for the supposed fear, or the court will overrule it. No ground appears here which justifies the bankrupt's assertion of his claim. Even if there was any danger from the disclosure of his "personal outside means," he has stated his assets in his schedules, and he has waived his right as to that. As to the rest, he shows no ground at the present time to suppose that he will be incriminated by answering the other questions. At least, he must indicate what he fears the inquiry may discover, and how the answers might lead to exposure. He must, moreover, submit to full cross-examination as to his property.

In this case, the petition shows that the matter with which he feared to incriminate himself related to certain securities, about which a witness (Gluck) had testified, and in connection with which one Nick Cohn was mentioned. Even if he had not waived his privilege, some of the questions set out in schedule C were clearly such as he could be compelled to answer. Very few of the questions related directly to the stocks mentioned, and many of them make no reference to Nick Cohn or to Gluck. A large number of them merely inquire whether he knows some 15 or 20 persons. There is no indication that he had ever been connected with any of these parties, except Cohn and Gluck, in any criminal transaction. Even if there was, the mere fact that he

knew, or had met, these parties would have no tendency to incriminate him. If the question submitted had been followed by another, inquiring into a transaction that might or might nor be criminal, then, if his privilege had not been waived, he might have declined to answer. But certainly there is nothing on the face of these questions, and nothing appears from the petition, that indicates the slightest danger to him in answering either that he did or did not know these parties.

Some of the questions submitted, therefore, being clearly proper questions, even if he had not waived his privilege, he was properly committed even if he had the right to refuse to answer some of the other questions. In other words, having refused to answer all the questions, he is, in any event, properly held until he has purged himself by answering those questions as to which he would in no event have a privilege.

For the reasons suggested above, it is submitted that the writ of habeas corpus was properly denied and the judgment should be affirmed.

Respectfully,

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

○

Supreme Court of the United States,

1

OCTOBER TERM.

No. 575.

JULES W. ARNDSTEIN, Appellant.

vs.

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York.

2

NOTICE.

To: RUFUS S. DAY,
GEORGE L. BOYLE,
WILLIAM J. FALLON,
EUGENE F. McGEE, Esqs.,
Counsel for Appellant,
and

To HON. WILLIAM L. FRIERSON, SOLICITOR GENERAL OF THE UNITED STATES.

3 PLEASE TAKE NOTICE that the annexed Petition and affidavit, verified November 15, 1920, will be submitted to the Supreme Court of the United States, at the Capitol, at Washington, District of Columbia, on Monday, November 22, 1920, at 12:00 noon or as soon thereafter as counsel can be heard and a motion made for the relief prayed for.

Dated, New York, November 15, 1920.

Yours, &c.,
FRANCIS M. SCOTT and SAUL S. MYERS,
Counsel for Henry A. Gildersleeve,
Trustee in Bankruptcy.

4 SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM.

No. 575.

JULES W. ARNDSTEIN, Appellant,

vs.

5 THOMAS D. MCCARTHY, United States Marshal for the Southern District of New York.

Petition of HENRY A. GILDERSLEEVE.

To the Honorable Judges of the Supreme Court of the United States:

The Petition of Henry A. Gildersleeve respectfully shows:

6 *First.*—Your Petitioner is the Trustee in Bankruptcy herein. Your Petitioner has been a member of the Bar of the State of New York for upwards of fifty (50) years and was for 14 years a Justice of the Supreme Court of the State of New York. Your Petitioner consented to act as Trustee in Bankruptcy herein at the request of a large body of representative surety companies and stock exchange houses, not only in this country but in England.

Second.—Your Petitioner now prays for the following relief: 7

(a) That he be allowed as such Trustee to intervene in the above entitled matter;

(b) That the appeal herein be re-argued;

(c) That the **entire** record be certified to this court;

(d) That the Mandate heretofore issued from this court to the District Court of the United States for the Southern District of New York in the Second Circuit, be recalled;

(e) That all proceedings in respect of the said Mandate be stayed until the further order of this court; and 8

(f) That such other and further relief be granted in the premises as to this court may seem just.

Third.—Your Petitioner further shows that neither he nor his counsel, Saul S. Myers, Esq., ever had any notice of the proposed argument of the appeal herein. Your Petitioner shows that the transcript of record was certified by the Clerk of the District Court of the United States for the Southern District of New York on October 7, 1920; that the case was filed in the Supreme Court of 9 the United States on October 8, 1920, as Number 575, October Term, 1920; that a motion to advance **without opposition** by the Solicitor General of the United States was submitted to the Supreme Court on October 11, 1920; that the motion was granted on October 18, 1920; that the case was assigned for argument on October 19, 1920; that the case was actually reached for argument on October 21, 1920, and was argued on that day and on the following day.

10 Your Petitioner further shows that neither he nor his said counsel, had any notice of any kind of any of the foregoing steps.

Your Petitioner further shows that on October 7, 1920, the said Messrs. Fallon and McGee left at the office of your Petitioner's said counsel, a citation, copy of which is hereto annexed and marked "Exhibit A" and your Petitioner shows that the said citation is specifically addressed to "Saul S. Myers, Attorney for the Trustee in Bankruptcy"; and your Petitioner shows that by serving the said citation upon the said Saul S. Myers, the said Messrs. Fallon and McGee intended that your Pe-
11 titioner should be represented on the said appeal, for the reason that the citation specifically states,

> "You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof."

Your Petitioner further shows that all of the proceedings to compel the Bankrupt to testify about his assets and liabilities were instituted by your Petitioner, through his said counsel, that the said Messrs. Fallon and McGee appeared in court in each and every step in the bankruptcy proceed-
12 ings; that they appeared with the said Saul S. Myers on each and every one of the motions and petitions set forth in the transcript of record herein and that in addition thereto, in September last, the said William J. Fallon appeared before Mr. Justice Brandeis on two (2) different days in support of a petition for a writ of habeas corpus and was required by that learned Justice to give notice to your Petitioner's said counsel; and that after Mr. Justice Brandeis had declined to grant a writ, the said William J. Fallon went be-

fore Hon. C. M. Hough in New York with an application for a writ and again your Petitioner's said counsel was notified of the application. A copy of the memorandum of the Hon. C. M. Hough is hereto annexed and marked "Exhibit B". 13

Your Petitioner further shows that on October 29, 1920, as soon as your Petitioner's said counsel learned that the appeal herein had been argued, he immediately wrote a letter to the Solicitor General, of which a copy is hereto annexed and marked "Exhibit C" and received an answer, of which a copy is hereto annexed and marked "Exhibit B"; and wrote a letter to the Clerk of the Supreme Court, a copy of which is hereto annexed and marked "Exhibit E", and received an answer, a copy of which is hereto annexed and marked "Exhibit F". This appears more fully from the annexed affidavit of Saul S. Myers. 14

Fourth.—Your Petitioner further shows that he is the real party in interest in this matter and that, having been cited to appear, it was not only irregular for Messrs. Fallon and McGee to bring the appeal on for hearing without notice to your Petitioner but it was likewise inadvertent for the Clerk of the District Court of the United States for the Southern District of New York to certify the record without notice to your Petitioner. The record is very incomplete as will be more fully referred to hereafter; and in support of the claim that your Petitioner is the real party in interest, your Petitioner shows that the creditors herein are either stock exchange houses or surety companies who have sustained large losses by reason of the theft of securities running into millions of dollars and it is claimed that these securities were stolen by messenger boys, schooled so to do by 15

16 the Bankrupt and his associates. Nearly all of the messenger boys have confessed, as appears in that part of the bankruptcy record which has not been certified. And it likewise appears, partly from the certified record and partly from the uncertified part of the record, that one of the messengers, namely, Joseph Gluck, handed over to the Bankrupt a large amount of securities, and it appears from the uncertified part of the record that the Bankrupt handed a large part of these very securities to one David W. Sullivan, who has likewise confessed.

17 *Fifth.*—Your Petitioner further shows that the question of law presented in this matter is not so much whether the Bankrupt may be required to testify in respect of his schedules but whether any bankrupt may refuse to testify in a bankruptcy proceeding notwithstanding his claim that the answers may tend to incriminate him.

Your Petitioner further shows that there is no suggestion that the Bankrupt has committed any Federal crime of which any answer called for would tend to incriminate the Bankrupt, save possibly the crime under the Bankruptcy Act of having concealed his assets; and the court is con-
18 fronted with the bald proposition that a bankrupt may refuse to disclose his assets and what he has done with them and what their extent, on the simple proposition **that if he did disclose his assets he might be convicted of having previously concealed them;** and he asks the court to protect him in a new crime of concealment in order to avoid possible conviction for a former crime of concealment.

The proposition is a very serious one and it is obvious that it would lead to the utter destruction of the means provided by law for the ascertain-

ment and administration of the assets of bankrupts.

In every case where a bankrupt sought to conceal assets, he would be entitled, if the Bankrupt's theory is correct, to refuse to answer any questions about his assets or business **on the ground that the present disclosure of his assets might convict him of previous concealment.** The privilege not to answer would be universal.

Not only would the privilege be one that might be exercised in **every** case, thus absolutely destroying the efficiency of the Bankruptcy Act but the more flagrant the concealment of assets, the greater the justification of the bankrupt in not answering and continuing the concealment.

Sixth.—Your Petitioner further shows that his said counsel has made a special study of this question from the time of the commencement of the Bankruptcy Proceeding in February last down to the time that the question was presented to Hon. John C. Knox, to Hon. A. N. Hand, to Hon. Martin T. Manton, and to Hon. C. M. Hough, and your Petitioner further shows that his said counsel, aided by Selden Bacon, Esq., traced the history of the law from the time of Lord Eldon in ex parte Cossens—Buck's Cases, 531 and reached the conclusion that it was never intended by the framers of the Constitution or by Congress that a bankrupt should be relieved from testifying fully and frankly about his assets and his liabilities.

Seventh.—Your Petitioner further shows that the brief of the Solicitor General, while indeed very able, is limited to the one question, namely; whether the Bankrupt in this proceeding should have been required to testify about his schedules

22 after he had previously claimed that to answer any question in the proceeding might tend to incriminate him; this is undoubtedly due to the fact that the record from which the Solicitor General argued, was incomplete inasmuch as that, among other things there was not printed in the said record the testimony given by the appellant Arnstein before Special Commissioner Gilchrist in the Bankruptcy proceeding, which testimony was recited in the order appealed from and the previous order of Sept. 1st, 1920, instructing the said Arnstein to answer certain questions, and the testimony of Joseph Gluck and David W. Sullivan, who testi-
23 fied to the circumstances under which the said Arnstein received and disposed of many of the securities which are alleged to have been stolen, for this court says, in its opinion:

> "It is impossible to say on mere consideration of the questions propounded, in the light of the circumstances disclosed, that they (the questions) could have been answered with entire impunity."

Eighth.—Your Petitioner further shows that the Mandate was transmitted to the District Court of the United States for the Southern Dis-
24 trict of New York immediately. Your Petitioner further shows that upon the Mandate reaching New York, to wit, on November 10, 1920, the Mandate was presented to Hon. J. M. Mayer with the request that he sign an order making the order of the Supreme Court the order of the District Court. Thereupon, the Hon. J. M. Mayer notified your Petitioner's said counsel to be present in court and your Petitioner's said counsel appeared with Hon. Francis M. Scott and, at the suggestion of Judge Scott, the said Arnstein was paroled in

the custody of his counsel, William J. Fallon, and 25
the matter was adjourned to November 24, 1920, in order to enable your Petitioner to present this petition.

Ninth.—Your Petitioner further shows that the Mandate requires the United States Marshal for the Southern District of New York to pay the costs of the proceeding and your Petitioner has been informed by his counsel that the said Marshal has no funds with which to pay the same and that the Mandate in this respect, at least, is incorrect.

Tenth.—Your Petitioner further shows that in 26
view of the fact that a consideration of the Mandate by the District Court has been set for the 24th instant, this matter be heard at the earliest date possible and your Petitioner therefore prays that the relief herein petitioned for be granted; that the Mandate be recalled and the whole record certified and your Petitioner granted leave to intervene and to present the brief herewith submitted, and to re-argue the appeal.

And your Petitioner will ever pray, etc.

Dated, New York, November 15, 1920.

HENRY A. GILDERSLEEVE, 27
Trustee in Bankruptcy.

FRANCIS M. SCOTT, and
SAUL S. MYERS,
Counsel for the Trustee in Bankruptcy.

34 B

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

of

35 The application of JULES W. ARNDSTEIN, petitioner, for a writ of *habeas corpus* directed to Thomas D. McCarthy, U. S. Marshal for the Southern District of New York.

MEMORANDUM.

Certain papers have been submitted to me containing a petition for a writ of *habeas corpus* directed as above and entitled in the Supreme Court of the United States and formally addressed to the
36 "Judges of the Supreme Court of the United States."

I take it that the application is made to me merely as a United States Judge, and that it makes very little difference in substance what may be the caption or form of the proceeding.

Revised Statutes Section 755 requires the Judge to whom an application is made to award the writ "unless it appears from the petition itself that the party is not entitled thereto."

From the papers attached to the petition or 37
from the papers on file in this Court and referred to in the petition, the following appears: On August 10, 1920, Arnstein was directed by Judge Augustus N. Hand to answer certain questions put to him in a bankruptcy proceeding.

The reasons given by Judge Hand for this direction are substantially those some time ago set forth in another case by Judge Learned Hand, **In Re Tobias,** 215 Fed. Rep. 815.

Arnstein refused to comply with this direction of the Court and answer the questions or any of them, but I cannot ascertain from the records of the District Court for the Southern District that 38
he has ever taken any appellate proceedings to review Judge A. N. Hand's direction. Having persisted in his refusal as aforesaid, Arnstein was on or about the 15th day of September, 1920, committed as for a contempt by Judge Martin T. Manton.

Immediately upon such commitment he petitioned for a writ of *habeas corpus,* which was refused for reasons set forth at length in an opinion filed by Judge Manton on September 17, 1920. I am informed, but there is no record evidence thereof before me, that since that date efforts have 39
been made by Arnstein to obtain other writs of *habeas corpus* or enlargement upon bail from the Circuit Justice.

The papers supporting this petition show conclusively that the one legal question raised throughout by Arnstein is that by requiring him to answer certain questions and committing him for not answering his constitutional rights have been invaded.

This is a mere question of law which has now been several times argued in this very proceeding

40 and as to which I fully agree with my colleagues. I am therefore of opinion that it appears from the petition itself that Arnstein is not entitled to the *habeas corpus* prayed for and the application therefor is denied.

C. M. Hough,
C. J.

Sept. 24, 1920.

Endorsed: U. S. District Court, S. D. of N. Y., Filed Sep 25, 1920.

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C 43

—copy—

October 29, 1920.

Hon. William L. Frierson,
Solicitor General of the United States,
Department of Justice,
Washington, D. C.

My dear Mr. Frierson:—

In re Jules W. Arnstein

In the above entitled bankruptcy proceeding, I represent the leading Surety Companies and 44
Stock Exchange houses as well as the Trustee in Bankruptcy, Hon. Henry A. Gildersleeve.

My attention has just been called to the fact that the appeal from Judge Manton's order in this matter was disposed of by the Supreme Court of the United States on the 22nd and 25th inst.

I had no notice of the matter of any kind except that on the 7th inst. a citation was left at this office, a copy of which is hereto annexed, marked Exhibit A.*

I will thank you to send me by registered mail—special delivery—at my expense, a copy of your brief and a copy of your adversary's brief; and I 45
beg to inquire whether your adversary was not required to give me notice. I do not know what the practice is, but I would have been glad to have had the opportunity of appearing with you and of submitting a brief along the lines of Lord Eldon's opinion in the case of Ex parte Cossens, Buck's Cases 531.

Awaiting your reply, and with best respects, I am

Very truly yours,

SSM-AML Saul S. Myers.
(Enc.)

* This is Exhibit A of the present record.

46 D

—copy—

WLF-TGB.

DEPARTMENT OF
JUSTICE

OFFICE OF THE SOLICITOR GENERAL,

Washington, D. C.

OCTOBER 30, 1920.

MR. SAUL S. MYERS,
47 60 Wall Street,
New York, N. Y.

DEAR SIR:

I am in receipt of your letter inquiring about the Arnstein *habeas corpus* case. The case was advanced by the Supreme Court and argued on October 22nd, but no decision has yet been announced. In compliance with your request I am sending you under a separate cover, a copy of my brief and that of opposing counsel.

Of course, the only defendant to this case was the United States Marshal who had Arnstein in
48 custody and I do not, therefore, know that our opponents were under any obligation to give this notice.

Respectfully,
WM. L. FRIERSON,
Solicitor General.

P. S.

I am sending the above mentioned briefs by Special Delivery and enclose the balance of the stamps.

Enc. 12786.

E 49

—c o p y—

October 29, 1920.

Hon. James D. Maher,
Clerk, United States Supreme Court,
Washington,
D. C.

My dear Mr. Maher:—

In re Jules W. Arnstein

My attention has been called to the fact that on the 22nd and 25th inst. the appeal in the above matter came on for argument and was disposed of. 50
The only notice I had of any such proceeding was a citation left at this office on the 7th inst., a copy of which is hereto annexed marked Exhibit A.* I had no other notice of any nature, kind or description.

Will you therefore be kind enough to take the matter up with the Chief Justice and ascertain whether it is not possible for me to have an opportunity to submit a brief? I have not seen the briefs of the appellant or of the Solicitor General, but I desire to particularly point out to the Court that in a bankruptcy proceeding a bankrupt may not claim that he can refuse to testify on the 51
ground that the answers may tend to incriminate him. I refer particularly to the opinion of **Lord Eldon** in the case of **Ex parte Cossens,** Buck's Cases 531.

In this proceeding, I represent the leading Surety Companies and Stock Exchange houses in this city, and Mr. Fallon well knew that I was in the matter because he twice tried to get a writ of *habeas corpus* from Judge Brandeis and each time he was instructed by Judge Brandeis to give me notice of the proceeding.

With best respects, I am

SSM—AML Very truly yours,
(ENC.) Saul S. Myers.

52 —copy—

F

OFFICE OF THE CLERK,

SUPREME COURT OF THE
UNITED STATES,

WASHINGTON, D. C.

October 30, 1920

SAUL S. MYERS, Esq.,
53 New York City.

Dear Sir:—

Your letter of the 29th instant, enclosing a copy of the citation served on you in the case of Arnstein *v.* McCarthy, No. 575, October Term, 1920, duly received, and I return the copy of the citation herewith.

This case was filed October 8th, 1920, as No. 575, October Term, 1920. A motion to advance with consent was submitted to the court on October 11th, and the motion granted October 18th, and the case assigned for argument on Tuesday, Oc-
54 tober 19th. The case was actually reached for argument on October 21st, and argued that day and the following day, and is now under advisement. I send you by same mail a set of the printed papers in the case. It is now too late for you to file a brief without the consent of the court. I cannot undertake to take up the matter with the Chief Justice. The case was ably argued by the Solicitor General for the appellees.

Yours truly,
JAMES D. MAHER, Clerk.
By M. R. S., Ass't.

TFD.

SUPREME COURT OF THE UNITED STATES. 55

OCTOBER TERM.

No. 575.

JULES W. ARNSTEIN, Appellant,

vs.

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York. 56

AFFIDAVIT OF SAUL S. MYERS.

STATE OF NEW YORK, }
City & County of New York, } ss.:

SAUL S. MYERS, being duly sworn, deposes and says:

1. I am the attorney of record for the Trustee in Bankruptcy herein and have had entire charge of this proceeding. 57

2. I have read the annexed Petition of Hon. Henry A. Gildersleeve, verified November 15, 1920. All of the statements of fact therein contained based upon knowledge and information obtained by me and transmitted to the said Trustee, are correct in every particular. I had no notice of the appeal before the United States Supreme Court except as stated in the said Petition. I at-

58 tended before Hon. John C. Knox, Hon. A. N. Hand, Hon. Martin T. Manton, Hon. C. M. Hough and before Mr. Justice Brandeis and the statements in the said Petition as to what took place before those justices is absolutely correct. I know, of my own knowledge, that the letters referred to Exhibits C, D, E and F were sent and received as stated in the said Petition. It is likewise true as stated in the said Petition, that, assisted by Selden Bacon, Esq., of the New York Bar, I made a special study of the constitutional questions involved in this matter. It is likewise true that Judge Scott and I appeared before Hon. J. M.
59 Mayer as stated in the said Petition. The said Selden Bacon is now in London.

SAUL S. MYERS.

Sworn to before me
November 15, 1920.
A. MALES,
Notary Public,
Bronx County.

60

Supreme Court of the United States

OCTOBER TERM.

JULES W. ARNSTEIN,
Appellant,
against
THOMAS D. MCCARTHY, United States Marshal for the Southern District of New York,
Respondent.

#575.

SUPPLEMENTARY AFFIDAVIT OF HENRY A. GILDERSLEEVE AND COPY OF TESTIMONY OF BANKRUPT.

State of New York,
City and County of New York, } ss.:
Southern District of New York,

Henry A. Gildersleeve, being duly sworn, deposes and says:

I am the Trustee in Bankruptcy herein, and as such I executed the petition for intervention for the certification of the whole record and for reargument, which petition was dated November 15th, 1920. In the course of that petition I referred (fol. 22) to the fact that "there was not

printed in the said record the testimony given by the appellant Arnstein before Special Commissioner Gilchrist in the Bankruptcy Proceedings."

I am handing up herewith the entire testimony of the said Arnstein. I wish in this affidavit to call attention particularly to a few items thereof. These items will show:

I. That Arndstein specifically and voluntarily denied having any stocks, bonds or other concealed assets.

II. That Arnstein's attention was called at the very opening of the examination to his privilege against answering incriminating questions and that he had counsel from the outset.

I.

On page 15, under date of May 15, 1920, Arndstein was asked and answered as follows:

> "Q. Have you any stocks or bonds now? A. I never had any in my life. I never owned a share of stock in my life. I never even saw a genuine certificate in my life. I never possessed one in my life, any negotiable stock."

On page 34 (the same date) the witness was asked and answered as follows:

> "Q. Did you ever have any stocks or bonds in your possession or under your control at any time during the past year? A. I never owned a share of stock; I never had a share of stock that was good, to my knowledge, in my life.

Q. What do you mean by 'good'? A. Well, anything that was negotiable.

Q. What? A. Negotiable.

Q. Did you have any that were not negotiable? A. Yes; I bought some years ago.

Q. We are talking about the past twelve months. A. No, sir.

Q. Have you had any stocks or bonds in your possession or under your control at any time during the last year? A. I just answered that."

At pages 37 to 38 of the testimony of the same day the witness was shown a list of stocks and bonds and was asked:

"Q. • • • Did you ever see any of those shares of stocks or bonds mentioned on this list • • •?"

and he answered: "No, sir."

For other illustrative denials of the possession and disposition of property see pages 13, 14, 15, 20, 21, 26, 34-35 (testimony of May 15, 1920); pages 2360, 2363, 2386, 2388 and 2389 (testimony of May 24th, 1920).

On September 14th the witness, when asked whether he "never had" in his "possession" or under his "control" a single share of stock or bond mentioned in the list earlier submitted to him, specifically referred to his earlier testimony. (See testimony of September 14th, page 2493.)

At the commencement of the very first examination, that of May 15th, the bankrupt was properly

Judge Manton's order denying the application for a writ—being the order here appealed from—thus begins (fols. 98-99):

> "The bankrupt herein having made application for a writ of Habeas Corpus, now on reading and filing the petition for such writ duly verified by the bankrupt, and on reading the order made herein September 14th, 1920, denying the bankrupt's motion for a stay pending appeal from the order of Hon. A. N. Hand entered September 7th, 1920, *and the order entered September 15th,* 1920, *adjudging the bankrupt in contempt of court and directing his imprisonment and all the papers upon which said orders were made and all the papers on which the said order was made, and on reading all of the papers and proceedings herein,* and after hearing William J. Fallon, Esq., and James W. Osborne, Esq., counsel for the bankrupt in support of the application for a writ of habeas corpus, and Saul S. Myers, Esq., counsel for Hon. Henry A. Gildersleeve, Trustee in Bankruptcy herein, in opposition, it is on motion of Saul S. Myers, attorney for the said Trustee,
>
> ORDERED that the said application be and the same hereby is in all respects denied."

Now, the very first among the "papers" upon which the "order adjudging the bankrupt in contempt of court and directing his imprisonment" was made is "the testimony of the bankrupt herein," taken September 14th, 1920 (Record on Appeal to this Court, fol. 91), and the order denying the application was, as we have just seen, put upon "ALL the papers" upon which this order adjudging

the bankrupt in contempt was itself made. Finally the order denying the application for a writ of habeas corpus was, as appears from the extract quoted above (Record on Appeal to this Court) made "on reading ALL of the papers and proceedings herein"—a phrase plainly broad enough to include all of the testimony of the bankrupt whenever given.

If this record had been submitted to me or to my counsel who argued the application below and all the orders preliminary to it, it, of course, would not have been certified without the inclusion of the bankrupt's testimony. While appellant's counsel thus had knowledge of all the matters in this affidavit contained—while indeed if they had not through inadvertent error omitted from the record Arndstein's testimony—all the matters in this affidavit would long ago have been before this court, I am perfectly willing to allow counsel for the appellant any reasonable time which this court may direct in which to answer this affidavit or the petition and affidavit of Mr. Myers to which this affdavit is supplementary, or the brief filed herein. My purpose in submitting the petition, affidavits, brief and record of Arndstein's testimony to the court at this time was to bring the whole matter of intervention and rehearing on at this Term of Court.

HENRY A. GILDERSLEEVE.

Sworn to before me, this
day of November, 1920.

A. MALES,
Notary Public,
Bronx County.

Supreme Court of the United States

OCTOBER TERM—1920.

No. 575.

JULES W. ARNDSTEIN,
Appellant,

vs.

THOMAS D. McCARTHY, United States Marshal for the Southern District of New York.

BRIEF IN SUPPORT OF PETITION OF THE TRUSTEE IN BANKRUPTCY FOR LEAVE TO INTERVENE, FOR THE CERTIFICATION OF THE ENTIRE RECORD AND FOR A REARGUMENT.

SAUL S. MYERS,
Attorney for the Trustee.

FRANCIS M. SCOTT,
WALTER H. POLLAK,
SAUL S. MYERS,
Of Counsel.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.

INDEX.

CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1920.

JULES W. ARNDSTEIN,
Appellant,
vs.
THOMAS D. MCCARTHY, United States Marshall for the Southern District of New York.

#575.

BRIEF IN SUPPORT OF PETITION OF THE TRUSTEE IN BANKRUPTCY FOR LEAVE TO INTERVENE, FOR THE CERTIFICATION OF THE ENTIRE RECORD AND FOR A REARGUMENT.

General Statement.

The trustee in bankruptcy asks leave to intervene in this proceeding, prays that the entire record be certified and petitions that upon that full record a re-argument may be had. The grounds upon which this application is made appear from the petition of the Honorable Henry A. Gildersleeve, the trustee.

verified on November 15th (Papers on Petition, page 15), and from the affidavit of Mr. Saul S. Myers, his attorney of record, verified the same day (Papers, pages 19-20). A supplementary affidavit of Judge Gildersleeve (verified November 20th) points out in detail the insufficiency of the record before this Court when it reversed the Court below; to the original typewritten copy of that affidavit is attached a copy of the stenographer's minutes of Arndstein's examination.

The record upon which this Court acted when it reversed the Court below was upon its face incomplete. Judge Manton's order denying the application for a writ of habeas corpus was by its own terms based in large part upon Arndstein's own testimony upon his examination. None of that testimony was included in the record upon which this Court ruled. The incompleteness of the record inevitably induced a misconception by this Court of the appellee's true contention. This misconception appears from the opinion of the Court itself. Mr. Justice McReynolds declared the issue to be whether or not the "schedules standing alone amounted to an admission of guilt." Upon a full record, the issue would have emerged as the very opposite of the issue this Court conceived it to be. Appellee's true contention is that the schedules and examination taken together, amounted not to an admission of guilt but to a denial of guilt. Having volunteered this denial—and having volunteered it in the light of the most explicit warning from both counsel and commissioner that he need not testify to incriminating matters—the bankrupt should have been subjected to the most rigorous examination with regard to his denial.

POINTS.

In detail the contentions of the trustee are the following:

I. The record upon which this Court acted, is upon its face incomplete: Papers—chief among them the bankrupt's own testimony—recited in the order of Judge Manton appealed from as the basis of his ruling are omitted from that record.

II. Upon a full record, appellee's contention would have emerged as the very opposite of that contention which this Court upon a fragmentary record conceived it to be. Appellee's true argument was not that the "schedule standing alone amounted to an admission of guilt"; appellee's argument as it would have been presented upon a full record was that the schedules and examination taken together amounted to a denial of guilt and that the bankrupt, having made his denial voluntarily, must submit to full examination with regard to it.

III. If the record had been complete the legal result upon the ap-

the appeal from the order of Hon. A. M. Hand, entered September 7, 1920, and the order entered September 15, 1920, adjudging the bankrupt in contempt of court and directing his imprisonment, and all the papers upon which the said orders were made, and on reading all of the papers and proceedings herein, and after hearing counsel for both sides." *Now the incompleteness of the record will appear from the merest examination of this order.* Thus the "order made herein September 14, 1920, denying the bankrupt's motion for a stay pending the appeal" does not appear in the record at all. There is no order denying a stay printed anywhere in the record, and the only order of September 14th (the one printed on page 61) is the order adjudging the bankrupt in contempt and itself referring (fol. 91) to "the order of Hon. M. T. Manton, dated September 14, 1920, denying a stay." We mention this omission of an order not as in itself important, but as showing that the record is *upon its face* incomplete; one of the documents specifically recited (fols. 98-99) in the order appealed from (fol. 100) is not printed at all.

Vitally important, however, is the omission of testimony of the bankrupt himself; for the trustee's contention that the appellant had waived his privilege against self-incrimination—and Judge Augustus Hand's decision that such was the case—was necessarily based upon that testimony. And upon that testimony, too, Judge Manton's order denying the writ of habeas corpus was not only necessarily—but was in terms—rested. We have already quoted Judge Manton's own statement of the papers and proceedings upon which his determination was based. Specifically

recited, it will be recalled (Record, fol. 98), was not only the order denying a stay, but also "the order entered September 15, 1920,* adjudging the bankrupt in contempt of court and directing his imprisonment" and *"all the papers upon which the said orders were made."* Now, the "order adjudging the bankrupt in contempt," is as we have said, printed on page 61. And the first of "the papers upon which the said order was made" is, as appears from that order itself (fol. 91), "the testimony of the bankrupt herein, taken September 14, 1920, before Commissioner Gilchrist" (Record, fol. 91).

Nor is this all. The record should have included not only Arndstein's testimony of September 14th, but every line and letter of his testimony whenever given. For Judge Manton's order denying the application for a writ of *habeas corpus*—the order appealed from—was by its own terms made not only upon "all the papers" upon which certain earlier orders were based. It was as well—and again by its own terms (fol. 98)—made "ON READING ALL OF THE PAPERS AND PROCEEDINGS HEREIN."

It might have been possible for this Court to affirm Judge Manton's order upon an incomplete record; for it was in the first instance the appellant's fault that the record was incomplete. But this Court cannot upon a self-evidently and vitally incomplete record reverse Judge Manton's order. (The proposition that the incompleteness of a record is properly shown upon a petition for rehearing is established by *Ex Parte Anderson Crenshaw*, 15 Pet., 119; *Security Mutual Life Ins. Co.* vs. *Prewitt*, 202 U. S., 246, 248).

*The reference to September 15th is apparently mistaken. The order adjudging the bankrupt in contempt is dated September 14th and is so referred to supra (page 56).

II.

Upon a full record appellee's contention would have emerged as the very opposite of that contention which this Court upon a fragmentary record conceived it to be. Appellee's argument was not that the "schedules standing alone amounted to an admission of guilt"; appellee's true argument as it would have been presented upon a full record was that the schedules and examination taken together amounted to a denial of guilt and that the bankrupt, having made his denial voluntarily, must submit to a full examination with regard to it.

The importance of all the foregoing is enormously enhanced when the record is viewed, not as we have heretofore viewed it, by its own light merely, but in the light of Mr. Justice McReynolds's opinion. Mr. Justice McReynolds thus stated what to his mind was the vital question and his ruling upon that question. "The writ was refused" the learned justice wrote "upon the theory that by filing schedules without objection the bankrupt waived his constitutional privilege and could not thereafter refuse to reply when questioned in respect of them. This view of the law, we think, is erroneous. The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime, and the mere filing of them did not constitute a waiver of right to stop short when-

ever the bankrupt could fairly claim that to answer might tend to incriminate him." The issue, in other words, was in Justice McReynolds's mind, and upon the altogether incomplete record before him, whether the "schedules standing alone" did or did not "amount to an admission of guilt." We purpose by a short analysis, to show how completely the issues as they were presented in this Court were transformed—how vitally they were distorted—by reason of the inadequacy of the record which (without the knowledge of the trustee or his counsel [Petition of Judge Gildersleeve *passim;* affidavit of Myers]) was certified to this *Court* from the court below. For in the court below, as Judge Manton's own order shows, the issue was not with regard to the schedules "standing alone." It was at least as much with regard to the "testimony of the bankrupt taken herein."

Nor is this all. The omission of the bankrupt's examination not merely removed much of the foundation of appellee's argument here: that omission literally turned that argument upside down. The words of Mr. Justice McReynolds showed that this Court conceived the appellee as basing his argument upon the proposition that the schedules "amounted to an admission," amounted to "clear proof of guilt"; in fact, appellee's argument was precisely the opposite. The schedules and examination, appellee argued, amounted to a denial of guilt. And as that denial was made with full knowledge that the witness need answer no incriminating questions, the witness, by making it, subjected himself to the fullest cross examination (see *Powers* vs. *U. S.*, 223 U.

S., 303; *Camminetti* vs. *U. S.*, 242 U. S., 470, and other cases cited under Point III, infra).

What appellee's argument really was—what appellee's argument would have been here if the whole record had been certified and if the counsel who had handled this litigation throughout had had an opportunity, upon that whole record, to present their contentions—is made perfectly plain by consideration of the supplementary affidavit of Judge Gildersleeve, verified November 20, 1920, and the annexed testimony of Arndstein. That affidavit shows two things. (1) It shows, to begin with, that not merely in the schedules but upon his examination Arndstein sweepingly denied the possession or disposition of assets. "I never had any" stocks or bonds "in my life" said Mr. Arndstein. "I never owned a share of stock in my life. I never even saw a genuine certificate in my life. I never possessed any in my life, any negotiable stock." (Minutes of May 15, 1920, page 15.) Again "I never owned a share of stock; I never had a share of stock that was good to my knowledge in my life." (Ibid, page 34.) (See also Testimony of May 24, page 2360 and references in the testimony of September 14th to this earlier testimony (supplementary affidavit of Gildersleeve).

(2) *That affidavit shows further that the witness gave all of this testimony after being warned by the commissioner almost before he opened his mouth that he need not say anything which could incriminate him and that he was the judge of what did and did not incriminate him.* (Testimony of May 15th, page 3. See also supplementary affidavit of Gildersleeve.) The record is indeed as Judge Gildersleeve in his supplementary affidavit points

out, fairly shot through with references to self-incrimination, and with manifestations of Arndstein's zeal in invoking his constitutional rights. To all of which we may add that Mr. Arndstein not only had counsel to guide him through hundreds of pages of testimony but declined to answer the simplest questions—declined to give even a brief list of the names he had borne—without the advice of that counsel. (Testimony of May 15th, page 2.)

Now the Court will bear steadily in mind that the precise purpose of the questions which the witness declined to answer and which Judge Hand ordered him to answer, which Judge Manton held him in contempt for not answering, and to avoid answering which Arndstein sued out his writ of habeas corpus—was to show that the witness's denials that he possessed assets, disposed of assets or concealed assets were false. The general nature of the charges against Arndstein is not in doubt. The petition for involuntary bankruptcy (Record, fols. 9-10), shows that the National Surety Company, the petitioner, has sustained great losses through thefts committed upon "Members of the New York Stock Exchange, investment houses and banking institutions" whose employees had been "bonded by your petitioner by what are commonly known as Blanket Bonds." "These bonds are intended to insure such persons against loss by theft, etc." Nicholas Arndstein was, then, charged with being the guiding spirit—the master mind—in a series of gigantic thefts. These thefts were thefts of securities. The witness Gluck testified to stolen securities in staggering amounts which he says he turned over to Arndstein—100 shares of American Beet Sugar, 100

shares of American Car Foundry, 100 shares of American Smelting & Refining, preferred, 100 shares of American Smelting & Refining, common, 70 shares of Baldwin Locomotive, 200 shares of Crucible Steel, 200 shares of Denver & Rio Grande Railroad preferred, 100 shares of Endicott-Johnson, 300 shares of Goodrich, 100 shares of Guffey Gillespie Oil Company, 100 shares of International Mercantile Marine, preferred, 400 shares of Mexican Petroleum, 200 shares of Ohio City Gas Company, 320 shares of Pennsylvania Railroad, 100 shares of Pond Creek, 100 shares of Republic Iron & Steel, 50 shares of Reynolds Tobacco Company, 300 shares of St. Louis and San Francisco Railroad, 100 shares of Studebaker, 200 shares of Texas Company, preferred, 600 shares of Union Pacific, 100 shares of United Retail Stores, common, 100 shares of Wheeling & Lake Erie, 100 shares of Worthington Pump, and bonds of Iowa Central Railroad and Wilson & Company (Record, pages 9 to 17, fols. 17 to 25, quoting testimony of Gluck in support of application to compel answers). All of these, Gluck says, he turned over to Arndstein and to another confederate, Cohen, in October and November, 1919 (Ibid, page 17, fol. 25). All of these charges Arndstein meets, as we have seen, with a blank denial. And then when an elaborate series of questions is put to him seeking to bring out the falsity of these denials, he declines to answer these questions. Take for instance the following questions 50-62 (Record, page 21), all taken from Schedule "C"—a schedule of questions put by counsel for the trustee which the bankrupt refused to answer on the ground that the answer might tend to incriminate or degrade him (page 19, fol. 13).

50. I show you a list of securities and ask you whether you ever had any of these securities in your possession or under your control? (Showing witness a list marked for identification of May 15th, 1920.)

51. Did you ever see any stocks or bonds during the past year, anywhere?

52. Did you touch any stocks or bonds any time, or place, within the past year?

53. Did you buy or sell any shares of stock or bonds at any time during the past year?

54. Do you say that you never had in your possession or under your control, a single share of stock or bond mentioned in this list Exhibit 1 for identification of this date?

55. Well, do you say that you never saw those securities?

56. You say you never touched them?

57. Did you ever see them in anyone else's possession?

58. Did you ever go to Washington with Nick Cohen?

59. Did you ever meet Nick Cohen in Washington?

60. Have you invested any money anywhere in the past year?

61. Have you handled any moneys since Lincoln's Birthday this year?

62. Have you had any property in your possession anywhere since Washington's Birthday this year?

Mr. Justice McReynolds, as we have said, held that the propriety of these questions must be dedetermined in the light of the "schedules standing alone." Indeed, upon the record before him he

could have held no otherwise; for that record did not contain the examination. The schedules, Mr. Justice McReynolds held, thus "standing alone" did not "amount to an admission of guilt or furnish clear proof of crime." He did not pass upon, we repeat, and could not pass upon the contention that the examination with the schedules furnished a clear denial of guilt—and a denial which opened the door to the very examination which commissioner, trustee, and counsel desired.

It is unnecessary for the purpose of this argument—an argument which simply asks leave of the court to hear the trustee's contentions, not now to judge them—for us to go ahead and show that if these contentions had been presented upon a full record, the result must have been different from the result to which this court came. The demonstration is, however, not difficult, and while unnecessary cannot be altogether superfluous.

III.

If the record had been complete the legal result upon the appeal would, we submit, have been the opposite of the result in fact attained. For the Trustee's contention that cross examination was proper because both in his schedules and upon his examination the bankrupt had denied the concealment of assets, is a contention sustained by the unbroken current of authority in this Court.

We have said that if the record had been full and had presented appellee's true contention, the legal

result of the appeal would have been the opposite of the result actually attained. We may at once explain that upon the incomplete record in fact presented and with the contention of the appellee as this court upon that record defined it, the result reached was an almost inevitable result. For the critical inquiry, we repeat, was in Justice McReynolds's own language whether "the schedules standing alone" did or did not "amount to an admission of guilt or furnish clear proof of crime," and whether "the mere filing of them did not constitute a waiver of right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him."

Now the schedules manifestly did not furnish *any* proof of crime. The federal crime involved—and no other was at issue (*Hale* vs. *Henkel*, 201 U. S., 43)—was, of course, the concealment of assets. And the schedules not only contain no admission of the concealment; they constitute the most explicit denial of concealment. The only asset he had in the world, Arndstein asserts, was an $18,000 bank deposit. His securities were "none." (Schedules, Record, pages 48, 55.)

Now let us suppose the record had been a full one and the question before the court the true question. The issue would then have been, as we have said, whether the examination and the schedules taken together constituted a denial of crime which opened the door to examination with regard to the crime. In that record—upon an opposite issue—the schedules would, of course, have had an opposite significance. Being denials of concealment they inevitably defeated the contention which this court upon an incomplete record thought was in-

volved—the contention namely: that there had been an admission of concealment (*See* IV, *Wigmore*, Sec. 2276, Note 2 and cases cited). But being denials which themselves reiterated the more explicit denials contained in the examination, the denials would have reinforced a contention that just because Arndstein had denied his concealment, he might be cross-examined with regard to it. The legal principle upon which appellee's true contention upon a full record would have been rested is not in doubt. A witness may if he chooses refuse to testify at all with regard to incriminating matters. But if he does testify he must submit to the most rigorous cross-examination upon these matters. At once the clearest and most familiar illustration is supplied by decisions upon the position of a defendant in a criminal case. He may, of course, refuse to take the stand altogether; he has not merely a privilege against testifying to incriminating matter, a privilege which according to the construction which this court has given to the Fifth Amendment, protects any witness whether or not a party in any litigation, civil or criminal (*Counselman* vs. *Hitchcock*, 142 U. S., 547; *Boyd* vs. *United States*, 116 U. S., 616); he has as well a privilege against testifying at all in the proceeding against him. And the fact of his failure to testify is in no way to prejudice his cause. But if he does testify he can be cross-examined with regard to every statement that he makes.

Fitzpatrick vs. *United States*, 178 U. S., 304, 315;

Sawyer vs. *United States*, 202 U. S., 151, 165;

Powers vs. *United States*, 223 U. S., 303, 314-315;
Cammineiti vs. *United States*, 242 U. S., 470-495.

See, also,

Regan vs. *United States*, 157 U. S., 301, 305;
Spies vs. *Illinois*, 123 U. S., 131, 181;
United States vs. *Mullaney*, 32 Fed., 370 (an early and clear statement by Judge Brewer);
United States vs. *Oppenheim*, 228 Fed., 220, 232.

It is hardly necessary to say that the application of these cases is most cogent to a situation like the present one where the witness was represented by counsel and perfectly understood his right to avoid self-incrimination. (See the monumental opinion in *United States* vs. *Kimball*, 117 Fed., 156, 159, a case cited with approval in *Hale* vs. *Henkel*, 201 U. S., 43, 63; see also *Knoell* vs. *United States*, 239 Fed., 16, 21.)

Upon the true issue that would have been presented upon a full record, the schedules would, in deed, have had a very special significance. For these schedules were voluntary statements of Arndstein's. (The declaration to the contrary on page 2 of appellant's brief—a declaration nowhere challenged in the appellee's brief—is entirely erroneous.) Arndstein did not file his schedules pursuant to any order of court. Even the fragmentary record before this court shows that. The order adjudg-

has its practical basis in the principle that "the privilege is to suppress, not to pervert the truth" (*In re Tobias*, 215 Fed., 815, 816, the leading case for the proposition that a bankrupt who has filed schedules may be examined with regard to them). The witness may refuse to tell his story at all, but he may not tell half his story—he may not under the cloak of a public privilege tell those half-truths which are the most dangerous falsehoods. But while the bases, theoretical and practical, of the two rules are related, the applications of the rules to any given situation are manifestly contradictory. The two rules start, indeed, from a common point, but they proceed in an opposite direction. (Compare *Brown* vs. *Walker*, 161 U. S., 591, 597-598, stating the two rules in successive paragraphs.)*

*The conclusion that the full record must be certified and reargument upon that record allowed would have followed, even if the contention of the appellee had been what the Court upon an incomplete record thought that contention to be. For without the examination it is as clearly impossible to tell how far Arndstein went in his examination towards admitting his guilt as it is to tell without that examination how sweeping were his denials. The Court manifestly could not tell whether or not Arndstein had made "an admission of guilt" or had "furnished clear proof of crime" without the record. "The only inquiry," as Mr. Wigmore (Vol. 4, Sec. 2276) points out, "can be whether by answering as to fact X" the witness has waived his privilege "for fact Y. If the two are "related facts, parts of a whole fact forming a single relevant "topic, then his waiver as to part is a waiver as to the re-"maining parts; because the privilege exists for the sake of "the criminating fact as a whole." (See also the leading case of *Foster* vs. *People*, 18 Mich., 266, quoted in Mr. Wigmore's discussion and in Mr. Justice McReynolds' opinion.) Manifestly the Court cannot embark upon this inquiry without knowing how the witness has answered "as to fact X."

IV.

Taking the situation as a whole, the case in its essence is identical with EX PARTE CRENSHAW (15 Pet., 119): In this case, as in that case, an incomplete record induced an erroneous result; the mandate here issued should be revoked as the mandate in that case was revoked.

Our argument has, we believe, proceeded further than the necessities of the case. It is sufficient, we repeat, for the purposes of the present application to show that the record was incomplete. It is unnecessary to demonstrate, as we have tried to do, that upon a full record and with an opposite contention on the part of the appellee there must have been a different result. The plain truth, of course, is that an appellate court cannot in justice either to litigants or to the court below reverse upon an incomplete record. Peculiarly is this the case where the party primarily interested was deprived of representation by the counsel who had handled an immense litigation in all its previous stages. (See for the significance of the appellee's absence *Ex Parte Anderson Crenshaw,* 15 Pet., 119); and for the significance of the record's incompleteness the same case, and also *Security Mutual Life Ins. Co.* vs. *Prewitt,* 202 U. S., 246, 248).

We may be permitted in conclusion a word with regard to what we may call the public aspects of the present application. The rule that a bankrupt who has testified in examination or schedules one way or the other with regard to incriminating facts

is—or until this Court spoke was—fortified by abundant authority (*In re Tobias*, 215 Fed., 815; *In re Bendheim*, 180 Fed., 918; *In re Walsh*, 104 Fed., 518, 520). The conflict between a bankrupt's obligation to reveal his property and the right of all men under the common law and under the Constitution not to be *forced* to incriminate themselves is an historic conflict. *Any* case that bears upon this conflict is an important case to the public. But particularly is this case an important one to the public. For the instant bankruptcy involves, according to the charges of the petitioner, one of the greatest and one of the gravest series of frauds and crimes ever brought to the attention of the bankruptcy courts or of any court.

It is the right of every litigant in every court to have his cause determined upon a full record, a record which presents his true contention. Particularly is it the right of an appellee in a court of last resort. Most particularly is it the right of the appellee in this court and in this case. For the true appellee is a public officer discharging a public trust. And the issues he submits for adjudication are in the fullest sense—alike in the facts upon which they arise and in the problems of law they present—public issues.

The petition for the certification of the record, for rehearing, and other relief, should be granted, and the mandate revoked.

Respectfully submitted,

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